DEKA CHAMBERS

BRIEFING
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WORKPLACE LIABILITIES

Introduction by
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INTRODUCTION

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Deka Chambers is a pre-eminent common law Set. We are proud of the range of market leading expertise we offer across our different practice areas. At the heart of our ethos is celebrating those things that connect us as well as championing our differences. This briefing is a reflection of that, showcasing the range and quality of our expertise with articles contributed by many of our practice teams.

We have chosen to focus on Workplace Liabilities. In this area alone we offer expert advice and representation on matters from HSE prosecutions and jury inquests, to civil claims for damages arising from workplace accidents both in the UK and abroad, to support from our commercial team on technical issues such as dealing with insolvent or dissolved companies and advice for employers whose business interests are potentially impacted by the recommendations of the Manchester Arena and IICSA Inquiries.

There are many areas where we offer complementary expertise, for example: the nexus between our family team's children work and our injury team's expertise in social services claims; the related work of our police, crime and inquests & inquiries teams; the union of our cross border and clinical teams in overseas surgery cases; or the benefit our professional negligence team enjoys from having in house commercial, criminal, family, property and injury practitioners.

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BRIEFING

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CRIMINAL PROSECUTIONS FOR HEALTH AND SAFETY OFFENDING

By Giles Bedloe & William Dean

Seven-year enforcement statistics published by HSE to 2020/21 (the last year for which full data is available) suggest a gradual decline in the annual number of regulatory outcomes. In 2015/16, 683 concluded criminal proceedings resulted in 645 convictions. By 2020/21 this had reduced to 185 convictions from 199 concluded prosecutions in Great Britain. 6,617 immediate improvement notices and 2,889 prohibition notices in 2016/17 had dropped to 5,000 improvement notices and 1,920 prohibitions by 2019/20. The 2019/20 total fines of £34.89 million is dwarfed by the £71.57 million imposed in 2017/18.

Covid may account for the drop, although current projections for 2020/21 suggest this declining trend will continue. Does this evidence greater compliance by businesses, more effective representation by lawyers or a reduction in activity / resourcing by the regulator?

Of 123 workers killed in work-related accidents in 2021/22, as expected construction (30), agriculture forestry and fishing (22), manufacture (22) and transport/storage (16) were the principal offending sectors.

Undoubtedly the introduction by the Sentencing Council of the definitive guideline for health and safety offences, corporate manslaughter and food safety and hygiene offences – effective from 1 February 2016 – has remoulded the landscape for health and safety prosecutions. Dealing with either corporate or individual defendant, the sentencer must first determine the offence category, requiring an assessment of culpability and harm. The court is obliged to apply only the factors listed in the Guideline.

Culpability is separated into very high (deliberate breach or flagrant disregard for the law), high (offender falling far short of the appropriate standard, or in the case of an individual actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken), medium and low. For organisations, very high culpability will apply where there are serious and / or systemic failures to address risk to health and safety.

In terms of harm, health and safety offences are concerned with failures to manage risks to health and safety and do not require proof that the offence caused any actual harm. The offence is in creating a risk of harm. Harm is split into levels A, B and C, with A encompassing death, physical or mental impairment resulting in lifelong dependency on third party care for basic needs, and significantly reduced life expectancy. Level B is stipulated as physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work, or causing a progressive, permanent or irreversible condition. Having assessed the seriousness of harm risked, the court must consider the likelihood of that harm arising between high, medium and low. Final assignment of the harm category will factor in whether the offence exposed a number of workers or members of the public to the risk of harm, and whether the offence was a significant cause of actual harm. A significant cause is one which more than minimally, negligibly or trivially contributed to the outcome. It does not have to be the sole or principal cause.

At the very top end for organisations with turnover of £50 million or more, fines of up to £10 million could result. For individuals a maximum two-year prison sentence could await. Mode of trial and maximum penalties for the range of offences under the Health and Safety at Work etc. Act 1974 are set out in Schedule 3A of the Act.

Applying the Guideline to corporate offenders requires particular attention to be given to: profit before tax; directors' remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet. However, the brackets set out in the Guideline are defined by turnover. Given the filing of audited accounts at Companies House, it is not unreasonable that failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine. The Guideline sets out what approach should be taken to assess turnover for public bodies, partnerships, trusts and charities.

The rationale for organisational fines being based on turnover rather than profit is clear. Film production company Foodles Production was fined £1.6m in 2016 for safety breaches that led to Hollywood star Harrison Ford being crushed by a hydraulic door on the Millennium Falcon that closed with "the force of a small car". Ford, then 71, was filming Star Wars: The Force Awakens at Pinewood Studios in Buckinghamshire. Foodles had a turnover of £50 million having posted a profit in 2015 of a mere £45,000. No doubt the invoice submitted to Disney for delivering the final three films in the 'Skywalker Saga' mitigated the impact of the fine. The company will have been relieved that Chewbacca was not also injured.

The fine must be sufficiently substantial to have a real economic impact, driving home to both management and shareholders the need to comply with health and safety legislation. The Guideline requires consideration of three additional principles when finalising the sentence: (i) the profitability of an organisation will be relevant. If an organisation has a small profit margin relative to its turnover, downward adjustment may be needed. If it has a large profit margin, upward adjustment may be needed; (ii) any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the fine arrived at. Where this is not readily available, the court may draw on information available from enforcing authorities and others about the general costs of operating within the law; (iii) whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.

Advisers who ensure clients provide full, cogent financial and organisational information can expect, by utilising the Guideline, to manage expectations as to outcome effectively.

Recent published HSE prosecution outcomes

The HSE is known to prosecute offending employers and other businesses where their risk management and safety-at-work strategies fall below legal requirements. A successful prosecution can lead to heavy fines and significant reputational damage, in addition to potentially serious injuries to employees. Below are a sample of recent cases. In most cases the HSE will also seek its costs, which may run to hundreds or thousands of pounds.

Connop & Son Ltd and others (October 2022)

Whilst installing concrete on a farm, the mobile arm of a concrete pump came into contact with an overhead power line, delivering an 11,000-volt shock to an employee, who lost consciousness. There was a failure of planning, implementation and control measures. The company was fined £50,000, with two individual workers also fined lower amounts.

Nestle UK Ltd (October 2022)

On a chocolate production line, a technician's sleeve was caught in a conveyor belt. His arm was pulled into the machine, and he suffered life-changing injuries. There had been a failure properly to assess the risk and to guard the roller. The HSE noted a previous similar event at a different factory. The company was fined £800,000.

Reliable Shipping Ltd (September 2022)

An employee loading a shipping container was lifted by the forks of a forklift truck. He fell, sustaining a fractured spine when he hit the corner of a pallet. The HSE found that there was no safe system of work for loading containers and no appropriate work at height equipment. The risk assessment was insufficient and had not properly assessed control measures. The company was fined £500,000, which was reduced to £400,000 on appeal. The judge said it had been an accident waiting to happen.

Riftward Ltd (t/a Playford Packaging) (September 2022)

A factory employee was caught in the chain drive of a box-making machine whilst trying to repair the equipment. His hand was severed and, although it was re-attached, he was left with lifelong pain and limitation of ability. There had been an inadequate risk assessment and no safe system of work to ensure isolation of machinery for repairs. The company was fined £115,000.

Sumner and another (September 2022)

Two directors of a company were involved in removing asbestos from a garage and other property, including by smashing it with hammers. Months later, further action was required to ensure removal of remaining debris. The unsafe original removal had been incomplete and increased exposure. Each

director was fined £1,400.

Kent Auto Developments Ltd (August 2022)

A worker was polishing brake drums for car parts whilst they were rotating on a manual metalworking lathe. The practice, condoned by the company, resulted in him being drawn into the machine. He suffered lacerations to his face, neck and arm. There had been no safe system of work, the practice had been known to be dangerous, and there had been no mitigation of the risk. The company was fined £12,000.

DEATHS IN THE WORKPLACE: THE ROLE OF THE JURY IN AN INQUEST

By Helen Pooley & Anirudh Mandagere

An analysis of the law and relevant statutory provisions, followed by some practical tips for practitioners preparing for an inquest with a jury.

The Law

In *R(Amin) v Secretary of State for the Home* Department [2004] 1 AC 633, Lord Bingham described the function of an inquest was to ensure that '*the full facts are brought to light; that culpable and discreditable conduct is exposed; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons from his death may save the lives of others.'*

In controversial cases, there is often a perception that juries are more ready to criticise state authorities and ensure a democratic inquiry into the person's death. Any inquests practitioner will recognise that a jury inquest brings challenges to case preparation. Accordingly, this article sets out the circumstances in which a jury can hear an inquest in an employment-related fatality and provides useful tips for adapting case preparation for a jury inquest.

When can a jury hear an inquest?

S. 7 of the Coroners and Justice Act 2009 ("the 2009 Act") provides, inter alia, that an inquest into a death:

- Must be held with a jury if the senior coroner has reason to suspect that the death was caused by a notifiable accident, poisoning or disease (S. 7(2)(c), "the mandatory provision").
- May be held with a jury if the senior coroner thinks that there is sufficient reason for doing so (S. 7(3), "the discretionary provision").

The Mandatory Provision

The 2009 Act provides that an accident, poisoning or disease is notifiable if notice is required under any Act to be given to a government department, an inspector or officer of a government department, or to an inspector appointed under S. 19 of the Health and Safety at Work 1974 (s. 7(4), 2009 Act). However, COVID-19 is not a notifiable disease (s. 7(5), 2009 Act).

The category of deaths caused by a notifiable accident, poisoning or disease largely relates to those reportable by employers or those in control of the premises to the Health and Safety Executive under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR 2013).

The RIDDOR Regulations. Regulation 6(1–2) of RIDDOR 2013 provides that a report must be made if a person dies of a work-related accident, or as a result of occupational exposure to a biological agent. A 'work-related accident' is defined as follows:

- An 'accident' includes an act of non-consensual physical work (Regulation 2(1)).
- A work-related accident includes an accident attributable to:
  - ◊ The manner of conducting an undertaking.
  - ◊ The plant or substances used for the purposes of an undertaking, or:
  - ◊ The condition of the premises used for the purpose of an undertaking or any part of them (Regulation 2(2))

More specifically, Regulation 11 of RIDDOR 2013 requires the reporting of deaths involving the supply or distribution (except by retail) of flammable gas. This does not extend to disposable gas containers.

A notable change from the previous iteration of the RIDDOR (RIDDOR 1995) is that an accident no longer includes 'an act of suicide which occurs on, or in the course of the operation of, a relevant transportation system'. The Office of Rail Regulation has since published guidance confirming that suspected suicides are not reportable under RIDDOR 2013. The Chief Coroner's Guidance on Juries in Railway Cases (Guidance No, 11) confirms this interpretation. If on the basis of evidence available at the outset of the

Investigation, a coroner suspects suicide rather than an accident, then the death is not reportable, and the inquest can be held without a jury.

Regulation 14 of RIDDOR 2013 provides exceptions to the general rule on reporting. Medical accidents arising directly from the conduct of an operation, examination or other medical treatment carried out by a supervised doctor or dentist are excluded from RIDDOR (Regulation 14(1)). Further, incidents arising out of or in connection with the movement of a vehicle on a road are not reportable, with the following exceptions:

- The person was injured or killed by an accident involving a train.
- The person was injured or killed by exposure to a substance being conveyed by a vehicle.
- Was engaged in work connected with the loading or unloading of any article or substance onto or off the vehicle at the time of the accident, or was injured or killed by the activities of another person who was so engaged, or
- Was engaged in, or was injured or killed by the activities of another person who was at the time of the accident engaged in, worked on or alongside a road.

Notifiable Diseases. These are covered by the Public Health (Control of Diseases) Act 1984 and Schedule 1 of the Health Protection (Notification) Regulations 2010. This includes anthrax, monkeypox, rubella, yellow fever and many others. As stated above, COVID-19 is not a notifiable disease by virtue of S. 30(1) of the Coronavirus Act 2020.

The Discretionary Provision

Where a jury is not required, the coroner retains a discretion to hold the inquest with a jury if there is 'sufficient reason for doing so'. This is a matter for consideration at the pre-inquest review. In the first instance ruling into whether a jury should be summonsed under S. 7(3) at the inquest into the death of Private Sean Benton, HH Peter Rook QC held that there is a presumption under Regulation 7(1) that a coroner will sit alone without a jury which must be displaced if the discretion is to be exercised.

In *R(Collins) v HM Coroner for South London* [2004] EWHC 241 (Admin), it was stated that a coroner's discretion must be exercised judicially. Relevant factors weighing against holding an inquest with a jury are as follows:

- A coroner sitting alone could give a reasoned decision, whereas a jury could not.
- The fact-finder would have to consider a mass of heavy and difficult documents; this exercise is better carried out by a professional fact-finder.
- The views of the family, and whether the facts of the case bear any resemblance to the situations in which a jury is required (*R (Paul) v Deputy Coroner of the Queen's Household and the Assistant Deputy Coroner for Surrey* [2007] EWHC 408 (Admin)).
- Any uncertainties in the medical evidence.

Commentary

Nearly ten years after RIDDOR 2013, the circumstances in which a jury must be summoned for an accident, poisoning or disease in employment continues to evolve with the times. Each inquiry will be fact-sensitive, and a careful analysis of Regulation 6 of RIDDOR 2013 is required to ensure that time and expense is not wasted at the outset of an inquest.

Indeed, where it becomes apparent during an inquest hearing that a jury must be summoned, anything done by the coroner before the jury is summoned is still effective (Pursuant to Rule 32 of the Coroners (Inquests) Rules 2013). However, in *R (Aineto) v HM Coroner for Brighton and Hove* [2003] EWHC 1896 (Admin) it was stated that there needed to be cogent reasons to deny a fresh inquest with a jury when the court decides that the first inquest should have been conducted with a jury.

Practical Tips

For those experienced and/or used to preparing for, and conducting, inquests, experience will tell you that a majority tend to be held without a jury.

What additional tactical and case strategy issues arise when one is preparing for an inquest involving an accident in the workplace, sitting *with* a jury?

- When advising a client in advance of the final inquest hearing, do not forget that the function and role of the jury will not necessarily be clear to them. It helps to explain why a jury is being asked to hear and determine issues at your particular inquest. Explain how the jury are selected and discuss any potential jury bias questions with your client – these are the sorts of things that might need to be raised with the coroner in due course and you must make sure you have instructions. In a case where a public body and/or company are an interested person, it tends to be sensible to explore whether members of the jury either work with, for or have a close association with that public body and/or company;

- You will want to ensure that you and your advocate (if different) have asked and/or have been told how the coroner intends to open the inquest to the jury. Often, the coroner will provide advocates with a copy of the intended opening in advance for them to consider. If this doesn't happen, it is worth asking at an early stage if possible (such as a Pre-Inquest Review).

- Site visits are used more and more frequently in inquests. An inquest involving an accident at work and sitting with a jury is a good example of a circumstance when a site visit might be a good idea. Jurors often make the request themselves but it pays to be proactive and flag this at an early stage if one might be appropriate. Site visits take time and considerable logistics to organise – a coroner will always be grateful if this issue is raised at an early stage.

- In addition to and/or as well as a site visit, jury inquests involving accidents at work are very likely to benefit from well thought out plans, maps and/or photographs. Again, thinking about these jury aids early is always beneficial. Depending on the issues, it often helps to have an agreed bundle of these sorts of documents that can be used during the inquest with all witnesses.

- Expert evidence is common in inquests involving accidents at work. At the Pre-Inquest Review, you should have grappled with the need for expert evidence and whether you are seeking for permission for your own expert and/or whether you are inviting the coroner to instruct their own expert. If there is a report from the Health and Safety Executive, for example, it would be important to identify whether your client is content with the conclusions in the same and/or to ask questions of the author or whether it is worth obtaining independent expert evidence. You will often find that corporate interest persons obtain their own expert evidence at an early stage and disclose the same to the coroner at an early stage – if you represent the family, you will want to think carefully about whether you have reason to ask the coroner to instruct their own independent expert and/or if they don't whether you have funding to seek one yourself.

- A case strategy and case theory is always crucial – to be most effective, this has to be flexible, particularly in the inquest environment. Whilst this is no different than when you are preparing for an inquest without a jury, it is perhaps even more important when there is a jury. Without the opportunity for an 'opening' or 'closing' speech as you have in civil proceedings, it can be difficult for a jury to follow your position and/or the argument you are trying to make on the evidence that is being heard. Dividing questions into themes and signposting are crucial. This way, the jury will understand why you are asking particular questions.

EMPLOYER'S LIABILITY AND THE EFFECT OF THE "ERRA"

By Jake Richards

This article will consider employer's liability and the effect of the Enterprise and Regulatory Reform Act 2013 ("ERRA").

The Act was passed by Parliament and aimed to reform the regulatory environment faced by small and medium-sized businesses. Section 69 ERRA amended section 47 Health and Safety at Work Act 1974 and restricted claims for breach of duty as breaches of health and safety regulations – there is no longer a self-standing cause of action available to a Claimant for breaches of the statutory duties of employers.

How were the courts to treat the regulations, then?

It remains common for pleadings to cite the regulations, despite the ERRA, and there has been little guidance from the upper courts as to the treatment of the regulations since. In *Cockerill -v- CXK Ltd* [2018] EWHC 115 (QB) it was put as such, by Collins-Rice J (as she now is):

"In removing the claimant's cause of action for breach of statutory duty, the 2013 Act did not repeal the duties themselves. Those duties continue to bind employers in law. So they continue to be relevant to the question of what an employer ought reasonably to do. However by enacting s.69, Parliament evidently intended to make a perceptible change in the legal relationship between employers and employees in this respect. It removed direct actionability by claimants from the enforcement mechanisms to which employers are subject in carrying out those statutory duties. What I have referred to as this 'rebalancing' intended by s.69 was evidently directed to ensuring that any breach of those duties would be actionable by claimants if, but only if, it also amounted to a breach of a duty of care owed to a particular claimant in any given circumstances; or in other words, if the breach was itself negligent. It is no longer enough to demonstrate a breach of the regulations. Not all breaches of the statutory regime will be negligent. Before the 2013 Act, the statutory regime had produced results in which employers were fixed with legal liability for accidents even where they had taken reasonable precautions against them. *Stark v Post Office* [2000] EWCA Civ 64 became a well-known example. A component in a postman's bicycle gave way even though the machine had been sensibly maintained and checked; the Post Office was held liable to the claimant even though it had not been negligent. Section 69 changed that framework, with a view to producing different results." [18]

The 'rebalancing' of the relationship means that employees who had suffered injury because of an unsafe workplace for reasons outside the reasonable control of their employer would not be successful by citing a breach of the regulations as their cause of action. They would now have to prove actual negligence on behalf of an employer. Not all breaches of regulations will be negligent. In Stark, the employer would not be liable for a bike in disrepair if it had undertaken reasonable maintenance of the same.

This analysis was considered, unfavourably, by HHJ Gore QC in *Tonkins v Tapp* (2018) obiter. Here, dealing with *Cockerill* directly:

'...it is unnecessary for me to decide the unresolved issue of whether breach of a statutory duty rendered non-actionable by section 69 of the Enterprise and Regulatory Reform Act nonetheless constitutes negligence ipso facto.

...I choose not to follow [the non-binding decision in Cockerill], and express my concern that the danger of producing the contrary result would be to emasculate the statutory duties.

That cannot have been Parliamentary intention in 2012, for if that had been the intention, Parliament would have instead have chosen to repeal the statutory duties in question.

...

I do not understand how it can be said...that, on the one hand, those statutory duties bind employers in law and continue to be relevant to the question of what an employer ought reasonably to do while, on the other hand, were evidently intended to make a perceptible change in the legal relationship between employers and employees. Those concepts seem to me to be mutually inconsistent.

Accordingly, I would not have been prepared to find that the effect of s69 was to deprive an accident victim of entitlement to rely upon a finding that breach of statutory duty constituted ipso facto negligence as constituting breach of the scope and standard of care reasonably required of the alleged tortfeasor by the statutory duty even if no civil right of action was available for its breach.' [102-105]

Accordingly, almost polar-opposite guidance was being offered by the courts. From a brief consideration of the two analyses, the former is clearly preferable in terms of seeking clarity, at least. The analysis in *Tonkins* would leave s69 ERRA essentially redundant and ignore Parliament's will. Parliament purposefully did not repeal the underlying statutory duties, but did seek to shift the balance by stifling the regulations as self-standing actionable causes.

Thankfully, the High Court appears to agree. The recent decision in *Chadwick -v- RH Ovenden Ltd & Hamilton* [2022] EWHC 1701 (QB) offers some further illumination. The facts of the case are, in summary, a Claimant was injured when dismantling a gas cannister when working for D2 at the premises of D1. The court considered the interaction between the Health and Safety etc Act 1974 and common law duties in light of ERRA. The analysis returned to that in *Cockerill*:

"It also does not seem to me to be correct to say that a breach of statutory duty under HSE regulations will after ERRA 2013 automatically constitute negligence; s69 ERRA 2013 removed the automatic link between a breach of the regulations and the right to claim damages. The most obvious situation where this occurs is where a regulation provided for strict liability for non-negligent breaches; following ERRA 2013 there is no claim in such a situation and that is a change that ERRA 2013 put into effect. Parliament has not, on the other hand, legislated in ERRA 2013 to remove or amend the common law liability of a person for negligence. I have set out below my analysis in relation to the Second Defendant as employer. That is followed by analysis in relation to the First Defendant as someone having control, bearing in mind that, in my judgment, those statutory duties continue to exist but that this is a claim in negligence and that a breach of regulation no longer automatically provides a civil remedy.' [61]

Indeed, the judgment went to the heart of the matter. The effect of neutering the regulations as causes of actions was to emphasise the importance as to the role of foreseeability: Parliament was stating that an employee should not be liable for unforeseeable accidents. This bolsters the common law position.

The reasonable steps that an employer should take are situation specific, and in particular will be influenced by the work that is to take place, and the harm that is foreseeable. It is an objective test as to whether an employer took reasonable steps and it is not for an employer to substitute their own test. An employer will be in breach of this duty if it fails to take a reasonable step even if the employer has not thought about whether or not it should take that step." [63]

Ultimately, the objective test cited above remains critical for personal injury practitioners and is fact-specific.

EMPLOYER'S LIABILITY FOR EMPLOYEES' INTENTIONAL TORTS

By Thomas Yarrow

In certain workplaces, an essential aspect of the employer's obligation to operate a safe system of work includes assessing and mitigating the risk of an employee coming to harm not from machines, manual handling, or trip and slip hazards, but from the intentional acts of third parties. Accidents of this type are not uncommon in workplaces where activities involve management of vulnerable people, for instance hospitals, prisons, police stations and schools. Where an employer has failed to take necessary steps to address the obvious risks posed to its employees in these contexts, negligence actions are often successful.

There are then of course, the litigation fuelling grey-area jobs where assaults by third parties are atypical but perhaps foreseeable, for instance in 'high-stakes' consumer facing workplaces such as banks, pubs and clubs, and late night food outlets. Cases in these contexts will tend to turn on 'reasonably practicable' steps which could/should have been taken by the employer to mitigate against the slender probability, but high impact, of infiltration into the workplace of criminal assailants.

Where, in contrast, an employee is injured in a workplace where injurious criminal acts are not as readily foreseeable, such as an out-of-the-blue assault on a shopkeeper in a bric-a-brac store on a sleepy high street, it is hard to see a negligence suit succeeding, unless there was a glaring safety failing on the part of the employer and/or a clear forewarning of danger. However, in a special category of case there may be an alternative cause of action for the injured party – where the injury was caused by someone for whom the employer might be vicariously liable: an employee on employee assault being the most obvious example. Establishing vicarious liability for an intentional tort, however, is not a straightforward exercise; the assumption is that an employee committing an assault is acting outside of the control of the employer.

Although not a workplace accident claim, the starting point for determining vicarious liability for third-party assaults is the Supreme Court decision in *Mohamud v WM Morisons Supermarkets PLC* [2016] UKSC 11. In that case, the claimant arrived at a petrol station kiosk run by the Defendant supermarket and approached one of the staff members. The staff member verbally abused the claimant and ordered him to leave. He then followed the claimant onto the petrol station forecourt where he told him to keep away and then physically assaulted him. The injured claimant brought proceedings against the Defendant supermarket alleging vicarious liability for the assault perpetrated by its employee. After the claim was dismissed at trial (with the decision upheld in the Court of Appeal), the Supreme Court came down on the claimant's side. The Court reviewed the jurisprudence on the relevant 'close connection' with employment activities test and declined to change it, but provided some simplifying guidance, saying courts should consider two central questions to establish a 'close connection':

(a) what functions had been entrusted by the employer to the employee (this had to be looked at broadly); and

(b) whether there was sufficient connection between the employee's wrongful conduct and the position in which he was employed to make it right for the employer to be fixed with vicarious liability.

In the circumstances of that case, it was the assailant's job to attend to customers and respond to their inquiries. His conduct in answering the claimant's request in a foul-mouthed way and ordering him to leave was within the field of activities assigned to him, however inexcusable. After this admonition, there was then an '*unbroken sequence of events*' (see the discussion below on some confusion with this phrase). Once both the claimant and the assailant had spilled out onto the forecourt, he had again demanded the claimant leave. That order was evidence of him working for his employer – there was nothing personal between him and the claimant. Although he grossly abused his position by the violence, it was still a purported act in the furtherance of the defendant's business. It was right that the defendant be held vicariously liable for the assault.

Mohamud has since been applied in a number of

cases involving injuries in the workplace (or extensions of the workplace), memorably in two office Christmas party cases, with opposite outcomes. *In Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214, the claimant attended a Christmas party organised by the defendant's managing director. After the party, many of the attendees (including the director) continued drinking in a nearby hotel where they were staying at the company's expense. A work-related discussion developed into a 'lecturing' from the director, which in turn led to an altercation between the claimant and the director in which the claimant was punched twice and knocked to the ground causing him to sustain a serious brain injury.

In considering whether the defendant company should be liable for its managing director's assault on an employee, the Court of Appeal considered *Mohamud* and the two questions for establishing a 'close connection'. In this case, the company was small and the managing director's remit and authority were very wide. The drinks occurred on the same evening as the paid-for work event. Although the actual drinking session did not seamlessly flow from the work event and attendance was voluntary, the managing director himself was not there in a social capacity; he was present as managing director and operating within that field of activity. Indeed, in the moments leading up to the assault he was exercising the company's authority over subordinates by summoning them to 'lecture' them. The attack followed from that and was work related, rather than being something personal between himself and the Claimant.

Lord Justice Irwin in a hesitant concurring judgment struck a warning note:

"this combination of circumstances will arise very rarely. Liability will not arise merely because there is an argument about work matters between colleagues, which leads to an assault, even when one colleague is markedly more senior than another. This case is emphatically not authority for the proposition that employers became insurers for violent or other tortious acts by their employees."

Shelbourne v Cancer Research UK [2019] EWHC 842 (QB), the second Christmas party case, perhaps demonstrates Lord Justice Irwin's point. Here, the claimant brough a claim against her employer both in their own right for failures in operating a safe system of work and as vicariously liable for the actions of a third party. Although not an assault case – the injury arose out of a badly performed dance-floor manoeuvre – the *Mohamud* test was nonetheless the correct one. The High Court considered the tortfeasor in this case was not required to attend the party, nor was he performing his work activities – laboratory work – while on the dance floor. His typical field of activity was therefore not sufficiently connected with his conduct at the party to allow vicarious liability to attach to the defendant employer.

What is clear, however, since *Mohamud* is that these cases will turn on their individual facts. Final determinations on the 'close connection' test are properly matters for the trial judge hearing evidence. It will be unusual for such cases to succeed or fail at an interim phase. For instance, in *TPKN v Ministry of Defence* [2019] EWHC 1488 (QB) – a case where the claimant, a servicewoman in the Royal Navy, brought a claim against the MOD as vicariously liable for the acts of another soldier who had allegedly raped her – the High Court, overturned the Master's decision to strike out the claimant's claim and enter summary judgment for the MOD. The High Court considered there was a real prospect of the claimant establishing vicarious liability.

The *Mohamud* principle also applies, of course, where vicarious liability can be established in quasi-employment as well as strict employment relationships. In *Levitt v Euro Building and Maintenance Contractors Ltd* [2019] EWHC 2926 (QB), a main contractor on a building site was vicariously liable for an assault carried out by an agent/servant of a subcontractor. An argument over work materials developed between the claimant and another subcontractor. After an escalation and affray, the claimant was struck on the back of the head with a scaffolding pole, causing serious injuries. The court considered *Mohamud*, determining that the close connection test was met - the assault was by one quasi-employee on another, it occurred during working hours on a site where the defendant was engaged, the background to the assault was an argument about work materials and occurred within a few minutes of that argument, there was an unbroken series of events, and work equipment had been used as a weapon.

Two subsequent cases, however, cast doubt on the

decision in *Levitt*. First, on the question of 'quasi-employment' the decision expressly followed *Various Claimants v Barclays Bank* [2018] EWCA Civ 1670; the Court of Appeal's decision was, subsequently, overturned by the Supreme Court ([2020] UKSC 13). Second, on the specific question of vicarious liability of employers/quasi-employers for assaults, the court re-visited *Mohamud* in another case (helpfully for mnemonic purposes) involving Morrisons – *Various Claimants v WM Morrison Supermarkets Plc* [2020] UKSC 12.

Although this was not an assault case, the Supreme Court noted that the courts below had erroneously interpreted Lord Toulson's judgment in *Mohamud*. In particular, they had considered first the judge's references to the unbroken temporal or causal chain of events between the rogue employee's employment activities and his tort, and second the irrelevance of the employee's motive, as giving rise to their own new legal propositions. This was not correct. The test was that the wrongful conduct had to be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it might fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment. That principle had to be applied with regard to the circumstances of the case and the assistance provided by the decided cases.

Since this case, successful vicarious liability claims for assaults in the workplace are a rarity, at least in the reported cases. It would seem as though the warning from Lord Justice Irwin in *Bellman* and the subsequent admonishment of Lord Reed in the *Morrisons* case have pushed the door back towards a near-closed position. Although the Supreme Court blamed judges of the courts below for misinterpreting Lord Toulson, the 'flavour' of the latter's judgment in *Mohamud* seems certainly more open to victims' establishing close connections in these types of cases than the current *status quo*.

OCCUPATIONAL STRESS

By Richard Collier and Lucy Lodewyke

Occupational stress claims are often treated as a distinct area of expertise in the field of employers' liability. Whilst they share the same key features of all such claims - duty of care, foreseeability, breach of duty, causation and loss – they have generated case law particular to the area, in particular in relation to the "threshold question" of foreseeability. This article provides an introduction to the concept of foreseeability in this context and then discusses what an employer might be expected to do in order to meet the standard of care once on notice of a risk to an employee's mental health.

Foreseeability of Injury

Foreseeability can be a difficult aspect of the claim to establish.

Specifically, a Claimant must establish the foreseeability of the injury suffered. An occupational stress claim will only succeed if psychiatric injury to that particular Claimant was foreseeable.

In assessing foreseeability, the court must consider what the employer knew, or should reasonably have known, about that employee.

The courts have acknowledged that psychiatric injury is harder to foresee than physical injury but that it will be easier to foresee in some individuals than in others (as per Hale LJ's judgment in *Hatton* at para [43(3)]).

An employer is usually entitled to assume that its employee can withstand the normal pressures of the job unless it is aware of some particular problem or vulnerability (*Hatton* at para [43(3)]).

The court in *Hatton* regarded foreseeability as the threshold question, that being whether this kind of harm, to this particular employee was reasonably foreseeable. The Court set out two distinct components:

First, there must be an injury to the Claimant's health, as distinct from occupational stress. Second, the injury must be attributable to stress at work, as distinct from other factors.

A number of factors will be relevant when considering the question of foreseeability.

Firstly, the nature of the work the employee is undertaking. This can include the workload itself, the hours worked and the nature of the work.

Secondly, anything specific to that employee. Consideration should be paid to any comments made in reviews or HR meetings and to any prolonged absences from work.

'...the employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisers.' *Hatton* at para [43(6)]

As a result of this, a failure on the employee to mention problems where there are clear and accessible forums open to an employee to do so, can be fatal to the issue of foreseeability.

However, the courts have been clear that foreseeability should be assessed on a case-by-case basis.

Swanwick J in *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts)* [1968] 1 WLR 1776 at para [1778]: '... the overall test is still the conduct of the reasonable and prudent employer taking positive thought for the safety of his workers in the light of what he knows or ought to know...'

Importantly, the test is the same whatever the employment, there are no occupations which should be regarded as intrinsically dangerous to mental health.

Breach of Duty

General principles

Establishing breach of duty in occupational stress cases will depend on whether, having been placed on notice of an impending risk of harm to health in the particular employee, the employer has taken proper steps to guard against that risk.

Some useful guidance was given by Hale LJ in *Hatton v Sutherland* [2002] EWCA Civ 76; [2002] ICR 613:

- "In all cases... it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care" (para 33).
- The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk (para 32).
- The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties (para 33).
- An employer can only reasonably be expected to take steps which are likely to do good: the court is likely to need expert evidence on this (para 34).
- If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job (para 34).
- In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care (para 33).

Steps reasonably expected

It must be emphasised that occupational stress cases are very fact-specific and the steps reasonably expected of employers depend upon the nature and extent of the risk the employer has been placed on notice of. That said there are certain steps which employers can generally, or at least often, be reasonably expected to have taken:

- Prompt referral to occupational health (and following the recommendations!)
- Addressing workload complaints
- Taking steps to deal with interpersonal problems
- Providing an EPA or counselling service, however this is not a panacea by which employers can discharge their duty of care in all cases: *Daw v Intel Corp* [2007] All ER 126; *Dickens v O2* [2009] IRLR 58. In *Daw*, for example, the consequences of management failings were not avoided by the provision of counsellors, and the only way of dealing with the Claimant's problems would have been for management to reduce her workload. In *Dickens*, the Claimant was already receiving counselling and the court found that rather than a perfunctory suggestion of using its in-house counselling service the employer should have made a referral to occupational health and allowed the claimant time away from work.
- Stress risk assessment, however *Easton v B&Q* [2015] & *Bailey v Devon Partnership NHS Trust* (2014 – unreported). In *Easton* Mr Justice William Davis said the following at paragraph 61 about employers conducting a general risk assessment:

  > "... it builds on the statutory requirement to undertake risk assessments. Where such a risk assessment showed a general risk of psychiatric injury to the relevant group of employees, it would then require individuals to complete a stress assessment tool either at appropriate intervals or when the individual was aware of signs of stress or both. By this route the employer who failed to take any steps in relation to risk assessment could be fixed with constructive knowledge of imminent psychiatric illness."

- Management support
- Pursuing disciplinary action with reasonable expedition (*Piepenbrock v LSE* [2018] ELR 596)

Steps not reasonably expected

Conversely there are steps which will typically be

considered unreasonable for an employer to be expected to take, including:

- Dismissal; As Devlin LJ put it in *Withers v Perry Chain Co Ltd* [1961] 1 WLR 1314 , 1320:

  > "The relationship between employer and employee is not that of a schoolmaster and pupil ... The employee is free to decide for herself what risks she will run ... if the common law were to be otherwise it would be oppressive to the employee, by limiting his ability to find work, rather than beneficial to him."

  NB except in extremis*; Barber*
  NB no claim lies re the manner of dismissal, even if it would constitute wrongful dismissal (*Johnson v Unisys*). This should be the subject of a claim in the employment tribunal.

- Abandoning legitimate performance management (*Vahidi v Fairstead School* [2005] E.L.R. 607)

- Abandoning organisational change (*Foumeny v University of Leeds* [2003] ELR 443)

- Steps that place an unreasonable burden on other members of staff (although employers should consider what other supportive measures might have been taken).

EMPLOYERS' LIABILITY IN A CROSS BORDER CONTEXT

By Sarah Prager

Employers' liability claims with a cross border element raise particular issues around applicable law and jurisdiction. As in all cross jurisdictional cases, the key to dealing with these issues lies in remembering that the two are conceptually entirely distinct, and in considering them separately.

Applicable Law

Generally there are two potential causes of action in claims arising out of accidents at work; contractual and tortious. It is theoretically possible, but extremely unusual, for the law governing one cause of action to be different to the law governing the other. This is because applicable law in a contractual context is governed by Regulation (EC) No.593/2008 ('Rome I'), whereas in a tortious context it is governed by Regulation (EC) No.864/2007 ('Rome II'), both of which remain in force (for the time being) as retained legislation post-Brexit.

Article 8 of Rome I provides that a claim brought in respect of an employment contract is governed by:

- The law chosen by the parties, if there is a choice of law clause (although it is not possible for parties to contract out of protections which would apply mandatorily under the applicable law in the absence of a choice of law clause);
- In the absence of a choice of law clause, the law of the country in which, or from which, the employee habitually carries out his or her duties pursuant to the employment contract;
- If this place cannot be ascertained (for example, where an employee works worldwide in many different countries), the law of the country where the place of business through which the employee was employed is situated;
- BUT, where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

At first sight, these provisions appear complicated, but in most cases ascertaining whether there is a choice of law, and if not, the law applicable, will be a relatively straightforward enquiry. This will yield the law applicable to the contractual claim.

Article 4 of Rome II provides that any tortious claim is governed by:

- The law of the country where the damage occurred (almost always, in an employers' liability context, the location of the event giving rise to the claim);
- UNLESS the employee and employer are both habitually resident in the same country, in which case the law of that country applies irrespective of the location of the damage;
- BUT, where it is clear from all the circumstances of the case that the tort is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply, and it is noteworthy that Article 4 expressly envisages that this connection might be based on a pre existing contractual or other relationship between the parties, suggesting that where there is a choice of law clause in an employment contract this might well provide a signpost to the applicable law in the tortious claim.

As with the contractual claim, practitioners should consider these provisions in turn in respect of any potential tortious claim; the result provided by consideration of the first and second provisions should then be cross checked against the third, against the backdrop of the law applicable to the contractual claim.

It is important to note that the applicable law will apply to all questions of liability and quantum, and (crucially) will govern the limitation period applicable to the claim. In any case with a foreign element, therefore, it is of paramount importance to identify the applicable law at an early stage so that the relevant limitation period (s) can be noted. This is obviously particularly so in

cases involving countries whose law measures limitation in months rather than years.

Jurisdiction

Jurisdiction is an entirely separate concept to applicable law. It is perfectly possible, and indeed is not unusual, for the courts of England and Wales to apply foreign law to claims.

Jurisdiction in an employment context is dealt with in s.15C of the Civil Jurisdiction and Judgments Act 1982, which provides that an employee may sue an employer in England and Wales if:

- The employer is domiciled within the jurisdiction;
- The employee habitually carries out the employee's work or last did so within the jurisdiction;
- The employee was engaged within the jurisdiction, if the employee does not or did not habitually carry out the employee's work in any one part of the United Kingdom or any one overseas country.

In addition, if there is a choice of jurisdiction clause in the employment contract favouring England and Wales, the employer may be sued within the jurisdiction, but the converse is not true; it is not possible for employers to contract out of the jurisdictional provisions in s.15C.

Furthermore, it may be possible to make a tortious claim against the employer in the courts of England and Wales where the employee sustains damage, including indirect damage such as loss of earnings, medical costs or a requirement for care, within the jurisdiction; but it will be necessary for the courts of England and Wales to be the appropriate forum for such an action, and each case will depend on its own facts.

Comment

The jurisdictional provisions allowing employers' liability claims with a foreign element to be brought before the courts of England and Wales have been underused to date. Post-Brexit it will be interesting to see how the law evolves in this developing field, particularly in the light of the contents of the so-called Brexit Freedoms Bill, which is designed to remove from the statute book all of the provisions discussed in this article, since all of them are underpinned by European legislation. As yet there is no indication of what, if anything, would replace the current rules on applicable law and jurisdiction, and although it may be anticipated that the government would attempt to put some safeguards in place, it is impossible to predict what the new regime will be. For the time being, practitioners would be well advised to diarise the deadline contained within the Bill, 31st December 2023, and to review all of their claims with a foreign element with a view to issuing them before that date if necessary.

Practitioners at Deka Chambers are well placed to advise as to these cases, having a wealth of expertise in claims of this nature, and with some notable successes in the area.

PERSONAL INJURY CLAIMS AGAINST INSOLVENT OR DISSOLVED COMPANIES

By Maurice Rifat

With recession comes discord, with discord comes insolvency. Employees, customers and members of the public may be exposed to injury by corporate bodies that subsequently become insolvent. The collapse of large companies such as Thomas Cook and Carillion are prime examples.

This short article gives a broad overview of the type of problems facing personal injury litigators when having to deal with claims against insolvent corporate bodies.

Where an insolvent company does not have relevant public or employer's liability insurance at the time of the Claimant's accident, that Claimant is very unlikely to recover anything even in the event of a successful personal injury claim. There are a number of procedural hurdles as set out below for a Claimant to overcome when pursuing such a claim and, unless the company pursued has assets with which to pay any judgment against it, pursuing the personal injury claim will likely be a fruitless exercise.

There are three types of liquidation: compulsory liquidation, members' voluntary liquidation and creditors' voluntary liquidation. A quick search on the Companies House website will reveal whether a company is in compulsory or voluntary liquidation (and whether voluntary liquidation is members' or creditors').

When a company enters into a formal insolvency or enforcement process, restrictions may be imposed on the ability of creditors or prospective creditors in the form of personal injury claimants, to bring claims against that company.

In a compulsory liquidation which commences with a winding-up order, claims and actions against the company in liquidation or its property are restricted by a statutory stay that takes effect under section 130 (2) of the Insolvency Act 1986 (IA 1986). The stay means that no action or proceedings can be brought, or continued with or against the company without the leave of the court. All claims fall into the liquidation. A personal injury claimant shares no higher status than any other unsecured creditor.

In the other two types of liquidation, namely members' voluntary liquidation and creditors' voluntary liquidation, the position is slightly different. No stay automatically arises when the company goes into voluntary liquidation. However, the company's liquidator, any creditor, or any contributory of the company may apply to the court under IA 1986, s 112, for a stay.

Once a stay is imposed, either automatically in a compulsory liquidation or by court order in a voluntary liquidation, the limitation period no longer runs. On any application to impose a stay (in voluntary liquidation) or lift a stay with the leave of the court, the court will apply certain factors namely whether the claim can be dealt with just as conveniently within the liquidation process and to ensure that one creditor does not obtain an unfair advantage over the general body of creditors.

On an administration, a statutory moratorium automatically arises under IA 1986, Sch. B1, para 43, which provides that no legal process or proceedings may be commenced, or continued with or against the company in administration or its property without either the administrator's consent, or the permission of the court. The moratorium automatically applies from the moment the company enters into administration. Proceedings can only be commenced, or continued with, against the company in administration either with the consent of the administrator (if they have been appointed), or the permission of the court.

As to the procedural hurdles in relation to dissolved companies, if a claim is to be issued against one an application would need to be made to the Companies Court to restore that company to the register. If a claim is made against a company which is dissolved at the time of issue and service, the proceedings are rendered a nullity although they can be retrospectively validated by subsequent restoration of the company (*Peaktone v Jodderel* [2012]) but such an indulgence is not open-ended and the court will be alert to whether there has been a timeous attempt to restore the company by a claimant within the litigation (see *Cowley v LW Carlisle & Company*

Ltd [2020] EWCA Civ 227).

Does the fact that there was an extant policy of insurance, for example, in the form of employers' liability or public liability insurance, make any difference as to whether the above hurdles still apply against a personal injury claimant?

The answer is, maybe. If there was an extant policy of insurance but the insolvency event and the event giving rise to the insured's liability (the accident or cause of injury) both occurred prior to 1st August 2016, then the Third Party (Rights Against Insurers) Act 1930 will most likely apply. This provides a mechanism for a Claimant to have a direct right of 'enforcement' against an insurer following a successful claim, but only where the Claimant had first established liability against the insolvent Defendant. So, the Claimant would still have to pursue the defendant directly to prove liability which would mean they would have to jump through the procedural hurdles as set out above. This scenario would most likely apply in the context of "legacy" type claims where a s.33 Limitation Act 1980 extension was required, or perhaps in relation to claims by minors.

Where there is a relevant policy of insurance and either the insolvency event or accident occurred after 31st July 2016, then the Third Party (Rights Against Insurers) Act 2010 will apply which makes things far more straightforward for claimants. Following implementation of the 2010 Act a Claimant can claim against an insolvent company's insurer directly. At the moment of the insolvency event, the claimant has a direct right to sue the insurer without joining the insolvent insured as a party. There was no requirement that the claimant first establish and quantify the insured's liability by a separate claim against the insured. The claimant is not required to sue the insolvent or dissolved company. In practice, this means that the Claimant does not need to apply to lift the automatic stay or to apply to restore a dissolved company to the register. It also means that in one set of proceedings against the insurer, the Claimant can seek a declaration from the Court as to both the liability of the tortfeasor company and the enforcement of that liability.

The 2010 Act provides Claimants with an important tool, namely the right to seek from the Insurer, or broker, details of the identity of the insurer, the policy terms, and other details of the insurance policy including the extent of the cover and deductibles. Insurers are required to provide those details within 28-days of request by the claimant.

Insurers are able to rely upon any defence that their insolvent insured would have had against the Claimant, including arguments of limitation and contributory negligence. Also, and importantly, the Insurer can rely upon any policy defences it would have had in a claim brought against it by the insolvent Defendant or avail itself of any limits on cover, including breaches of conditions precedent, deductibles and self-insured retentions. It is necessary to bear in mind that limitations on cover would apply, even in the event of a successful personal injury claim. This might mean, for example, that policy deductibles may exceed the value of the damages claim, leaving the Claimant unable to pursue the insurer and having to join the ranks of unsecured creditors of the insolvent Defendant .

The 2010 Act came into force on the 1 August 2016. It does not have retrospective effect. It is important to remember that the 1930 Act will continue to apply to certain personal injury claims, such as "legacy" claims and where perhaps the claimant was a minor at the time of the accident. It is important for parties, and especially Claimants, to carefully consider whether or not the 2010 Act applies to their claims.

Where businesses and other corporate bodies close down or become insolvent, the 2010 Act simplifies the process for Claimants seeking to recover damages for personal injury. Closure and insolvency of businesses will inevitably result in the loss of key documents and witnesses and there is a risk of speculative and fraudulent personal injury claims. Insurers should ensure that records relating to their policyholders are maintained and accurate, especially where the insurer is aware of a pending insolvency.

A final point to note is that the limitation period continues to run in claims against liability insurers under the 2010 Act (see *Rashid v Direct Savings Ltd* [2022]) 8 WLUK 108). Accordingly, claims against the insurers were likely to be time-barred even if the limitation period had not expired when the insured was wound up. The pause on limitation recognised in *Financial Services Compensation Scheme v Larnell (Insurances) Ltd (in liquidation)* [2005] EWCA Civ 1408 as applying under the 1930 Act, is not available under the 2010 Act, due to their fundamental

difference being the 1930 Act merely enabled the enforcement of an award as an auxiliary right in the insolvency process of a company, while the 2010 Act allows the complete action for damages to be laid against the insurer without the participation of the insolvent company.

The personal injury litigator is now required to be a contract and insurance law specialist.

INJURIES ARISING FROM MANAGING VULNERABLE OR CHALLENGING PATIENTS

By Ella Davis

According to the Health and Safety Executive ("HSE"), violent and aggressive incidents are the third biggest cause of injuries reported under RIDDOR from the health and social care sector. These include verbal and physical abuse from angry patients and relatives, but this article considers specifically injuries which are sustained in the course of caring for challenging or vulnerable patients and aims to give practical tips for dealing with such claims.

Breach

HSE identifies healthcare employees involved in the following activities as at increased risk of violence and aggressive behaviour:

- working alone;
- working after normal working hours;
- working and travelling in the community;
- handling valuables or medication;
- providing or withholding a service;
- exercising authority;
- working with people who are emotionally or mentally unstable;
- working with people who are under the influence of drink or drugs;
- working with people under stress.

Obviously, many of these activities are often unavoidable in a healthcare context. It is usually impossible for employers to remove all risk of injury from patients to healthcare workers. Nevertheless, all employers owe a duty to take reasonable care to protect their employees against a reasonably foreseeable risk of injury in the workplace. Importantly, under the Management of Health and Safety at Work Regulations 1999, employers must undertake suitable risk assessments and make arrangements for the health and safety of their employees by effective planning, organisation, control and monitoring and review[1].

The standard of care will, however, be informed by the context of a healthcare setting. In *Hill v Ministry of Justice* [2022] EWHC 370 (QB), Cotter J[2] described the view that some occupations carry an "unavoidable" level of risk as an oversimplification. He considered that the better analysis is that for many occupations the risks in question cannot be wholly eradicated save by measures which would be either impracticable and/or unacceptable to the public generally and/or unlawful (or in breach of a duty owed to relevant individuals such as pupils, patients or prisoners) and/or too costly to be met by public funding. He cited the well known dicta of Hale LJ (as she then was) in *King v Sussex Ambulance NHS Trust* [2002] EWCA Civ 953 in which she held that the same duty of care was owed, without qualification, to those whose occupations in the public service are inherently dangerous as to any employee. However, the ambulance service in that case also owed a duty of care to the members of the public who had called for their help. They did not have the option of a commercial enterprise in refusing to take a job. Therefore, while they must not expose their employees to an unacceptable risk, what is reasonable may have to be judged in light of the service's duties to the public and the resources available to perform those duties.

Cook v Bradford Community Health NHS [2002] EWCA Civ 1616 is an example of where that standard of care was not met. The claimant was a healthcare assistant in a psychiatric hospital. She was bringing refreshments to a corridor outside a room in which a patient with a prolific history of assaulting patients and staff was being nursed in open seclusion. While she was there, the patient was allowed out of his room to go to the toilet and assaulted the claimant. The Court of Appeal upheld judgment in favour of the claimant. They acknowledged that the health authority had a difficult task in looking after such patients and that there was no avoiding exposing employees to risk. However, they should not expose employees to needless risks. The closer an employee's dealings with a patient, the greater the risk. But an employee whose function was to bring coffee had absolutely no need to be close to the patient. It did not matter that she was a trained healthcare assistant who at times

would have been tasked with caring for patients. At the time of the assault her only function was the provision of refreshments.

The significance of a parallel duty to a patient was considered in *Buck v Nottinghamshire Healthcare NHS Trust* [2006] EWCA Civ 1576. This case again involved an assault by a psychiatric patient with a significant history of assaulting staff. The issue was whether the patient should have been locked in her room overnight to reduce the risk of her harming others. The Court of Appeal accepted the submission that the standard of reasonable care is that which is reasonably to be demanded in the circumstances. Further, one of the circumstances in that case was the nature and extent of the duty of care owed by the hospital authorities to the patient and their responsibility in treating the patient's mental illness. However, they rejected the contention that the court should only find negligence if there was a failure to act in accordance with the practice accepted at the time as proper by a responsible body of persons of the same profession or skill (therefore applying the Bolam test). While the duty owed to the patient was relevant, the duty owed to the employees could not be tested simply by asking whether what occurred did or did not amount to a breach of duty to the patient. Provided precautions could be taken to avoid exposing employees to needless risks without breaching any duty to the patient, a failure to take such precautions may well be negligent.

Another key question which frequently arises is whether the risk was foreseeable. Sometimes a patient acts in an entirely unpredictable manner and, particularly where they have no known history of similar incidents, a competent risk assessment could not have identified that they posed any risk. Practitioners should consider whether, even if there is no relevant history, any other factors such as an underlying condition or a change of medication or environment should have alerted the employer to a possible risk and what steps it would be reasonable to take in response to that theoretical risk. In *Hill,* Cotter J referred to the concept of a baseline risk posed by prisoners and held that the claimant had failed to establish a risk sufficiently above the baseline risk addressed by the usual systems in operation, to require additional measures.

Causation

Having identified a potential breach of duty, it is necessary to give careful thought to whether that breach made any difference. Often patient assaults happen so quickly that there is little if any opportunity to stop them. If a risk assessment was inadequate, would the control measures which should have been identified have prevented the injury in question? If staffing levels were inadequate, could another person have stepped in in time to prevent injury[3]?

An example of a claim failing on causation, albeit in an educational rather than a healthcare setting, is *Cunningham v Rochdale Metropolitan Borough Council* [2021] EWCA Civ 1719. The Court of Appeal held that the judge was wrong to find that there was no breach of duty in a failure to complete risk assessments. Equally the judge should have found that a failure to carry out a return to school interview and a restorative justice meeting after an earlier assault on the claimant by the same pupil was a breach of duty. In respect of causation, the Court of Appeal held that *Vaile v Havering LBC* [2011] EWCA Civ 246 did not establish any new principles of law in relation the issue of causation. In that case a finding that on the balance of probabilities if a teacher had been warned about a pupil's ASD and had been trained in how to manage a pupil with ASD, she would have avoided being attacked by that pupil, was sufficient to prove causation, even though the mechanism by which that would have occurred could not be shown. In *Cunningham* however, there was a finding that senior staff were aware of the pupil's deterioration generally and that the claimant was experienced and trained. The judge found that a written risk assessment would not have made a difference as it could not be shown that the incident arose because of a lack of awareness either of the pupil's deterioration or of the risk he posed. This breach of duty was therefore not causative of the claimant's loss. Further, the Court of Appeal held that it was possible, but not probable that the pupil would not have assaulted the claimant if he had had a return to school interview and a restorative justice meeting. The attack was not of a kind that was likely to have resulted from the failure to hold these meetings.

Costs

An important issue that practitioners should be alive to is that the Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims, and consequently fixed recoverable costs, do not apply to claims "for damages in relation to harm, abuse or neglect of or by children or vulnerable adults". The meaning of this exception has proved controversial. In

Scott v Ministry of Justice [2019] EWHC B13 (Costs) Deputy Master Friston rejected an implicit submission that 'harm' meant personal injury per se, holding that its true meaning was given by the surrounding words 'abuse or neglect' and noting that the definition of 'vulnerable adult' (taken from the Legal Aid, Sentencing and Punishment of Offenders Act 2012), itself was dependent on the definition of 'abuse'. A vulnerable adult "means a person aged 18 or over whose ability to protect himself or herself from abuse is significantly impaired through physical or mental disability or illness, through old age or otherwise." Deputy Master Friston also noted that if 'harm' encompassed any personal injury, any claim for personal injury caused to a child would be excluded which was inconsistent with the express terms of other parts of the Protocol. He held that in order to bring a claim within the 'vulnerable adult' exception, the context in which the claim is being brought must sensibly support such a conclusion. Each case will turn on its own facts but (in his view) clearly if the basis of the claim is that a person had been subjected to abuse or neglect then such a conclusion would naturally follow. If, on the other hand, the putative vulnerability was "merely incidental" to the claim and is relied upon solely for the purposes of avoiding fixed costs, the opposite conclusion would tend to follow.

This judgment is likely to be persuasive where such issues arise, but it has not persuaded everyone. In a subsequent county court decision *(Cameron v Leicester City Council 24 June 2021),* the DCJ for Leicester and Northampton, HHJ Hedley noted that he was not bound by Scott and moreover considered that it was both distinguishable and wrongly decided. HHJ Hedley again noted the ambiguity in the drafting of the exception and in particular the difficulty in defining 'harm'. In his view 'harm' is not just any personal injury but nor is it synonymous with 'abuse'. The deliberate infliction of injury in that case in his judgment amounted to both 'harm' and 'abuse'.

In *Cameron* both parties had indicated an intention to apply for any appeal to be transferred to the Court of Appeal but after a rolled up hearing before the circuit judge was ordered such application was not pursued. The point therefore remains very much moot.

1. Though of course a breach of these statutory duties does not of itself give rise to civil liability.
2. Counsel for the claimants in *Buck v Nottinghamshire Healthcare NHS Trust*
3. In *Buck* there was no appeal from the judge's finding that there were inadequate staff but that more staff would not have made any difference owing to the savagery of the attack.

PERSONAL INJURIES CLAIMS BY NURSES

By Susanna Bennett

Nursing is a demanding profession, and ever more so as pressure on the NHS increases. Claims by nursing staff against their employers comprise a surprisingly high number of civil claims and cover the whole gamut of employer's liability, from slips and trips to needlestick injuries and occupational stress. Personal injury claims are commonly brought by nursing staff arising from:

- slips and trips;
- manual handling tasks;
- defective or dangerous equipment;
- acquisition of infectious diseases;
- repetitive movements (resulting in repetitive strain injury);
- occupational stress (covered elsewhere in this briefing); and
- violence and aggression from patients (also covered elsewhere in this briefing).

As I will set out in this article, the question for lawyers bringing or defending claims by nurses can be reduced to whether the injury has been sustained as result of the relevant employer failing to take reasonable steps to prevent reasonably foreseeable harm to its employee(s)[1]. Whilst this is the same principle applicable to all claims against employers at common law, I outline below aspects of such claims which are especially relevant in the context of nursing.

The Relevance of Health and Safety Regulations

Sometimes known as the "six pack" regulations, the following six regulations impose statutory duties on employers in relation to the health and safety of (principally) their employees. They were implemented pursuant to section 15 of the Health and Safety at Work Act 1974 (the "1974 Act"):

- the Workplace (Health, Safety and Welfare) Regulations 1992;
- the Manual Handling Operations Regulations 1992;
- the Personal Protective Equipment at Work Regulations 1992;
- the Provision and Use of Work Equipment Regulations 1998;
- the Management of Health and Safety at Work Regulations 1999;
- the Control of Substances Hazardous to Health Regulations 2002.

Of particular relevance to the context of nursing, an employer has statutory duties to:

- make provision for every enclosed workplace to be sufficiently ventilated (reg. 6(1) of the WHSW Regulations);
- ensure that the temperature in all indoor workplaces is reasonable during working hours (reg. 7(1) of the WHSW Regulations);
- ensure that every workplace has suitable and sufficient lighting (reg. 8(1) of the WHSW Regulations);
- as far as reasonably practicable avoid the need for its employees to undertake manual handling operations which involve a risk of their being injured (reg. 4(1) of the MHO Regulations);
- provide suitable personal protective equipment to its employees who are exposed to a risk to their health and safety while at work (reg. 4(1) of the PPEW Regulations);
- ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair (reg. 5(1) of the PUWE Regulations);
- make a suitable and sufficient assessment of risks to the health and safety of his employees to which they are exposed whilst at work (reg. 3 (1) of the MHSW Regulations).

Breach of health and safety regulations is a crime pursuant to s. 33(1)(c) of the 1974 Act. But civil liability for breach of the above regulations was removed by

s.69 of the Enterprise and Regulatory Reform Act 2013 (the "2013 Act") (effective from 1 October 2013). As such, the regulations, and specifically their relevance to determining the content of an employer's common law duty of care, have long been a bone of contention between claimants and defendants. The issue has most recently been considered by Simon Tinkler (sitting as a Deputy High Court Judge) in *Chadwick v R H Ovenden Ltd* [2022] EWHC 1701 (QB) who stated at [61]:

"...In my judgment it is clear that ... the underlying statutory duties remain in place unchanged, certainly in relation to the criminal consequences of breach of those duties and so far as the HSE as the responsible regulator remains concerned. It also does not seem to me to be correct to say that a breach of statutory duty under HSE regulations will after ERRA 2013 automatically constitute negligence; s69 ERRA 2013 removed the automatic link between a breach of the regulations and the right to claim damages. The most obvious situation where this occurs is where a regulation provided for strict liability for non-negligent breaches; following ERRA 2013 there is no claim in such a situation and that is a change that ERRA 2013 put into effect. Parliament has not, on the other hand, legislated in ERRA 2013 to remove or amend the common law liability of a person for negligence..."

The writer submits that the six pack regulations are relevant to the content of an employer's common law duty of care as they are illustrative of what steps a reasonably diligent employer is expected to take. But the test for common law breach of duty is flexible, being any failure by an employer to take reasonable steps to keep its employee(s) safe from reasonably foreseeable harm. The focus is reasonable foreseeability of harm, and this determines what actions are required. Furthermore – in contrast to the position before the 2013 Act – the claimant always retains the burden of proving that the defendant has failed to take reasonable care (excepting the rare application of the principle of *res ipsa loquitur*).

Risk Assessment

An employer's duty of care is likely to include a duty to conduct adequate risk assessments for its operations[2]. Equally, evidence of thorough risk assessments which are regularly reviewed (and from which the recommendations are actioned) is the best starting point for an employer to defend a claim.

In the writer's view risk assessments by healthcare providers in respect of risks to nursing staff are particularly important. First, they provide evidence that potential hazards have (at least) been recognised, which is significant bearing in mind the multitude of potential hazards encountered in a healthcare setting. Secondly, in those healthcare settings which pose inherent dangers (for example wards housing aggressive patients), risk assessments are an opportunity for an employer to demonstrate that it has balanced the risks to staff against the duty owed to patients in deciding on an appropriate system of work.

Responsiveness to Accidents and Near Misses

An employer is required to be aware of accidents or near misses affecting its nursing staff and to react by implementing any reasonably necessary precautionary measures. If there is no evidence that an employer has evaluated a change in risk following an accident or near miss, it will be open to the suggestion, should there be a subsequent accident, that changes ought to have been made. Equally, an employer must act swiftly following an accident or near miss, for example in completing any investigation, to avoid something similar occurring before precautionary measures have been decided upon and carried out.

Improvements made after an accident are not necessarily evidence of a previous breach of duty. Rowena Collins Rice (sitting as a Deputy High Court Judge) reasoned in *Cockerill v CXK* [2018] EWHC 1155 (QB) at [67]:

"There is no necessary logic that post-accident improvements must be taken to be suggestive of pre-accident deficiencies, even where, as in the present case, it was accepted that the improvements had been made in the light of the accident. When asked about the addition of extra tape, both Ms Newton and Mr Wilkins simply said they thought of doing it just to make things a little bit better. That is a natural instinct, and I am unable in this case to draw an inference of a previous breach of a duty of care from their having done so..."

Liability for Defective Equipment

Pursuant to the Employer's Liability (Defective Equipment) Act 1969 an employer is held to be liable for personal injury suffered by its employee as a result of a defect in equipment which is wholly or partly

attributable to the fault of a third party.

Claimants should be careful to differentiate between defective equipment and equipment used inappropriately and/or poorly maintained (the latter scenarios being the more common). In the former scenario the Act offers an (often overlooked) cause of action for claimants as an alternative to breach of the common law duty of care.

A full discussion of the Act is beyond the scope of this article. However it is submitted that nursing staff would be wise to investigate the cause of any defective "equipment" (including clothing) which results in personal injury, and not to assume that a successful claim will always require negligence on the part of their employer.

1, Excluding claims under the Employer's Liability (Defective Equipment) Act 1969

2. See paragraphs 110 and 89 of *Kennedy v Cordia* [2016] UKSC 6, approved at paragraphs 63 and 64 of *Chadwick v Ovenden* (the latter a case concerning an incident which postdates the 2013 Act).

CICA CLAIMS
By Robert Parkin

As Tom Yarrow has described in his article on employer's liability for intentional torts, on occasion injuries are sustained in the workplace as a result of criminal conduct. Where a crime has been committed there is a prospect of seeking compensation from the Criminal Injuries Compensation Authority ("CICA"). Although the CICA does not award legal costs, nonetheless some of these cases are of a complexity where legal representation is beneficial. It is also useful for those acting in subsequent compensation claims to have an understanding of the Scheme. Following *AT v Dulghieru* [2009] EWHC 225 a claimant in civil proceedings does not need to give credit for an award received from the CICA, but under the terms of the Scheme the Claimant must repay the CICA in full up to the amount of the civil award. This article explores the circumstances in which a claim may be brought under the Scheme, the heads of loss that might be pursued and some of the procedural requirements that must be met.

CICA Claims are applications under The Criminal Injuries Compensation Scheme 2012[1]. These regulations provide for compensation for the victims of certain violent or sexual criminal offences.

Persons who have survived but have been physically or psychologically injured as a result of violent crime may have little recourse to civil compensation, as an unenforceable judgment against an impecunious perpetrator will be of small comfort.

The regulations are intended to remedy that injustice by providing for compensation from central funds through the "Criminal Injuries Compensation Authority ("CICA").

When Does the Scheme Apply?

Only certain offences will suffice defined in Annex B of the scheme. These are usually violent offences such as (sexual) assault, battery; arson etc. There need be no conviction, indeed, no crime (as such) need have arisen, e.g. if there is a defence of insanity.

A claim may be made by the victim, a person who took an exceptional and justified risk to prevent offending or apprehend the suspect, or unusually a witness to an offence committed against a loved one, see paras.4-6 of the scheme.

The offence must take place in Great Britain or associated places (e.g. a UK registered ship) as set out in Annex C of the scheme.

The Claimant must be:

- Ordinarily resident in the UK,
- A British citizen or a close relative of a British citizen,
- A person with leave in under the Brexit transitional period,
- A diplomat or soldier stationed here or a family member thereof,
- A victim of human trafficking.

Withholding or Reducing the Award

An award will be withheld if:

- The crime is not reported to the police as soon as reasonably practical.
- The applicant co-operated with any investigation as far as reasonably practical.
- The assailant is a family member of the applicant and lives with the applicant unless they no longer live together and will not again.
- The assailant may benefit from the award.

An award may be withheld or reduced by a reasonable amount[2] if :

- The Applicant does not co-operate with CICA.
- The conduct of the Applicant requires it.
- The Applicant has unspent convictions falling within Annex D of the scheme.

The award will be reduced by other payments received as a result, e.g. civil compensation, to prevent

double recovery.

Injury Payment

The injury must be directly, but not necessarily solely[4], attributable to the crime, which is to say that it must have been caused by it[5].

PSLA compensation is payable pursuant to the tariff set out in Annex E of the scheme. This is much less generous than, say, the JSB Guidelines. Medical evidence is required and is funded by CICA. Assessing the duration is critical. The minimum is £1,000 - figures below this attract no award. In exceptional circumstances, non-tariff injuries of equivalent seriousness may be compensated.

Loss of Earnings

Where the applicant has limited or no capacity to work as a result of the crime, they may claim loss of earnings, provided that they were in work at the time of the crime. That will terminate when the applicant no longer qualifies (e.g. by recovering or retiring).

However, the provisions are very limited. The first 28 weeks are not compensated, and past loss of earnings is limited to the Statutory Sick Pay amount - currently £99.35 per week.

Future loss of earnings can be compensated on the same basic principles, but will be reduced to account for investment in accordance with Annex F of the scheme.

Expenses

Certain strictly limited expenses are payable where directly attributable to the crime. These include:

- Personal property used as a physical aid - e.g. a wheelchair or glasses.
- Costs of NHS payments (e.g. for prescriptions) or the equivalent- not private care.
- Special equipment needed as a result of the accident.
- Adaption of accommodation.
- Costs of care.
- Costs of supervision (e.g. for mental patients).
- Court fees payable to the Court of Protection/ Public Guardian.
- Costs of the administration of the applicant's estate (e.g. where incapable of managing their affairs).
- Costs of setting up a trust.

These expenses will be reduced to take into account entitlement to benefits or insurance.

Legal costs are not recoverable.

Fatal Injury Cases

Certain relatives of a victim who has died as a result of the crime may make certain claims for compensation.

Cohabiting spouses/civil partners; unmarried partners cohabiting for a 2 year period or more; non-cohabiting spouses/civil partners or former spouse/ civil partner who are financially dependent on the victim; a parent or child of the deceased may claim a bereavement payments (if not divorced or estranged). If there is only one potential recipient, the amount is £11,000. If there is more than one, £5,500 each.

A qualifying child will be entitled to £2,000 p.a. (and pro-rata for part years) from the date of death to their 18th birthday.

A dependency payment will be made to a financially or physically dependant relative. That will run from the date of death to the expected date of death of the victim; retirement; or the actual date of death of the dependant, or 50 years, whichever comes first. This will be made only if the main source of income was not benefits on the date of death. The amount is the equivalent of Statutory Sick Pay.

Adjustments are made for future payments under Annex F. Claims by "physically dependant" relatives, however, are awarded as an expense, so are not reduced in line with Annex F.

Funeral payments of a minimum of £2,500; up to a maximum of £5,000 if reasonably incurred; may be paid.

A dependency or child payment may be made where a recipient of an injury award subsequently dies.

A qualifying relative of a person who would have qualified for an injury award, but has died for unrelated causes before applying, may apply on that person's behalf for an award within two years of death .

Procedure

There are rigid procedural requirements with harsh procedural penalties for non-compliance.

Compliance is particularly important, as only one application may be made in respect of each injury however disposed of - so if a claim is struck out, a date missed, or is withdrawn, it cannot be re-issued and the Applicant loses the chance to be compensated.

A claim is started by an application to the CICA within two years of the injury being suffered, or, in the case of a fatal injuries claim, death. It is possible to seek an order waiving that limit[6]. In exceptional circumstances it may be deferred pending criminal proceedings. The application may be withdrawn at any time.

CICA must make a written decision, which the Applicant must either accept the award in writing, or seek a review, within 56 days of the decision. This is extendable to 112 days (at CICA's discretion) on the applicant's written application in exceptional circumstances.

If the Applicant does neither, no actual payment of the award will be made, and the award may be withdrawn resulting in a loss of entitlement.

An award, where accepted, will normally be paid as a lump sum. Alternatively, directions may be made for the setting up of a trust. An application may be reopened once determined if there is a risk of a significant injustice as a result of death or a material change of circumstances. Usually this must be done within two years of acceptance of the award.

An Applicant may, within 56 days, seek review of an initial award or a refusal to make an award. That application for a review leads to a decision either remaking or maintaining the reviewed decision. CICA may vary the amount of an award, including downwards, even if already paid, if material undisclosed information comes to light or there is a material change of circumstances.

An applicant who is dissatisfied with a review decision may appeal to the First Tier Tribunal ("FTT").

Procedure is outlined in The Tribunal Procedure (First -tier Tribunal) (Social Entitlement Chamber) Rules 2008. A non-compliant appeal may be struck out[7].

Procedural adaptations may be made in cases where the applicant is a vulnerable witness[8].

It is open to CICA to revise the decision again when faced with an appeal, and if so the Applicant must either accept or reject that decision, which, if agreement can be reached, will result in the settlement of the appeal.

The FTT may:

- Make such decision and give such direction as it sees fit.
- Re-open a withdrawn decision.
- Extend a time limit.
- Re-open a decided application.
- Direct an interim payment.
- Make deductions if an appeal is frivolous or vexatious.

The FTT decision may itself be challenged in the Upper Tribunal by way of Judicial Review[9].

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1. Earlier schemes apply to applications brought before 27 November 2012- in 2008; 2001; 1996; and 1990 respectively. It is hard to imagine there are many left, if any. This article considers only the 2012 Scheme.
2. *RT v (1) The First-tier Tribunal (Social Entitlement Chamber), (2) Criminal Injuries Compensation Authority* [2016] UKUT 0306 (AAC)
3. *VG v (1) F-tT (2) CICA* [2017] UKUT 0049 (AAC)
4. *R.(CICA) v First-tier Tribunal (CIC)* [2019] UKUT 15 (AAC)
5. *BD v (1) First-tier Tribunal – Criminal Injuries Compensation (2) Criminal Injuries Compensation Authority* [2016] UKUT 0352 (AAC)
6. *BC v First-tier Tribunal and CICA* [2016] *UKUT 0155 (AAC)*
7. *CJ v F-tT (Criminal Injuries Compensation) (JR) [2016]* UKUT 0007 (AAC)
8. *M v (1) First Tier Tribunal (2) CICA* [2017] UKUT 0095 (AAC)
9. ss.15-18 Tribunals Courts and Enforcement Act 2007

THE INDEPENDENT INQUIRY INTO CHILD SEXUAL ABUSE – A FAMILY LAW PERSPECTIVE

By Laura Hibberd

Introduction – What is the IICSA?

The Independent Inquiry into Child Sexual Abuse (IICSA) was established in March 2005 under the Inquiries Act 2005. Those who gave evidence were granted whistle-blower protection by the Attorney General, and the Inquiry officially opened in June 2005 by the Chair, Professor Alexis Jay OBE. The Chair was assisted by an expert panel, namely Professor Sir Malcom Evans KCMG OBE, Ivor Frank and Drusilla Sharpling CBE. A Victims and Survivors' Consultative Panel was set up to assist and advise the Inquiry, and a Forum was established for any victim or survivor to receive updates and participate in public meetings.

The Truth Project was established to offer the opportunity for victims and survivors to share their experiences in a safe way. Over 6,200 victims and survivors participated, and most of those (5,862) agreed to be part of the scope and research of the IICSA. Their contributions are quoted in parts of the final report.

The Terms of Reference, required for any public inquiry, were for the IICSA to:

- consider the extent to which State and non-State institutions have failed in their duty of care to protect children from sexual abuse and exploitation;
- consider the extent to which these failings have since been addressed;
- identify further action needed to address any failings identified;
- consider the steps necessary for the State and non-State institutions to take in order to protect children from such abuse in the future; and
- publish a report with recommendations.

The scope was very broad: in terms of State and non-State institutions, geographically covering all of England and Wales, and no temporal limit other than 'within living memory'. An interim report was published in April 2018, but the final report was published on 20th October 2022 drawing upon 7 years of work.

This article cannot cover all 468 pages of the final report, but will consider some of the conclusions and recommendations from a family practitioner point of view namely: the legislative amendment(s) proposed, their potential impact, and whether this may give rise to a new area of litigation.

The Report's Recommendations

The report itself does not make for easy reading. The scale of abuse which children have suffered is deplorable. Due to long-term issues of under-reporting, failing to identify victims, and no consistent approach to recording data, the scale of abuse of children is not fully known. A recent "conservative" estimate is that 500,000 children are abused (physically and/or sexually) in a single year[1]. Local authority data for England showed that 2,600 children in England were placed on child protection plans under the primary category of sexual abuse in 2019/20. Furthermore, in the year ending March 2020, child sexual abuse was identified as a risk factor in 29,640 children's services assessments and child sexual exploitation in 16,830 assessments.

One of the recommendations is that the UK and Welsh Governments improve data collection around child sexual abuse and exploitation into a single core data set for England and Wales. This would require children's social care and criminal justice agencies to use consistent and compatible data – such as characteristics of victims and alleged perpetrators, factors increasing vulnerability and recording the context in which abuse occurs.

Child Protection Authorities

The report recommends establishing independent Child Protection Authorities (CPAs) for England and Wales, with the remit of sexual, physical and emotional abuse, and neglect of children – the report rightly recognises that these issues are often intertwined and cannot be artificially separated. The IICSA proposes the creation of a Minister for Children with cabinet status to promote children's welfare and ensure child protection is taken seriously and made a

priority. The report identified issues with multi-agency approaches and failures to identify not only if a child was suffering harm but also if they were at risk of suffering harm. The report discusses whether agencies (including local authorities and the police) acted promptly enough or at all to safeguard children. It is envisaged CPAs would address institutional failures and improve and promote child protection alongside the other recommendations within the report.

CPAs should be independent and a non-departmental public body (or an arm's length body in Wales) dedicated to the issue of child protection and implementing the recommendations of the Inquiry. It does not seem the CPAs should take direct action to safeguard children, but instead assist statutory agencies in their work: e.g. providing advice on emerging forms of harm and how to address them, and providing resources for child protection practitioners and good practice models. The CPAs would also have inspection responsibilities with the ability to make referrals to appropriate regulatory bodies for any failings.

Empowering Children and Young People – the Children Act 1989

The report finds that looked after children are particularly vulnerable to sexual abuse and exploitation, which is unsurprising. The number of children in residential settings has decreased[2] over time, however, the number of looked after children has increased every year since 2010. Children are likely to be accommodated in residential settings due to additional needs which make a foster care placement unworkable. Thus, those children tend to be slightly older (average age of 14.6) and more likely to have experienced trauma in their parental home and have become disempowered. The report aims particularly to assist those children.

The Truth Project identified patterns of children going missing from care due to being unhappy with their circumstances – and running away could be an indication of abuse or exploitation in (or in the vicinity of) their placement. This is perhaps an important piece of research and evidence to note for practitioners dealing with applications such as recovery orders or secure accommodation orders, and whether there should be further enquiry into why the child is absconding from their placement.

Currently, children in care can express their views about their circumstances through the following:

- Section 22(4) Children Act 1989 – this requires the local authority to ascertain the wishes and feelings of the child as far as reasonably practicable;
- Section 26A Children Act 1989 – local authorities must arrange advocacy provisions for children and young people in their care who wish to make a representation under this section;
- Ofsted reports and inspections;
- Children's Commissioners for England and Wales surveys and research;
- Charities and other such organisations; and
- A formal complaint can be made to Children's Commissioners or to the Local Government Ombudsman.

The report identifies a lacuna in the above: children in care cannot change their legal position through any of these options. The court has no jurisdiction under the Children Act 1989 to consider the welfare of a child in care; there is no equivalent to a s8 order which limits a parent's parental responsibility. Whilst Independent Reviewing Officers (IROs) can refer a child's case to court, this is rarely used in practice.

Children can apply to discharge a care order, but without a viable alternative carer this is unlikely to achieve change. Alternatively, applications under the Human Rights Act 1998 can be made for injunctions, declaratory relief or damages. Judicial review is not likely to provide much success for children seeking to challenge a placement, as they would have to demonstrate a local authority has behaved illegally, irrationally or procedurally improperly. This is a high threshold, decisions being contrary to a child's wishes and feelings or welfare does not necessarily equate to illegality or irrationality.

The IICSA has therefore recommended that the Children Act 1989 be amended to allow a child to bring an application directly to court. The proposed test mirrors the s31 threshold wording of the 1989 Act: the court should consider whether it is satisfied there is *"reasonable cause to believe that a child who is in the care of a local authority is experiencing or at risk of experiencing significant harm, on application by or for that child"*. If it is so satisfied, it is proposed the court can:

- prohibit a local authority from taking any act/

proposed act which it would otherwise be entitled to take; or

- give directions to determine a specific question which has arisen/may arise in connection with the local authority's exercise of parental responsibility for a child.

It is proposed the interim test also mirror the existing Children Act 1989 wording, i.e. "reasonable cause to believe" a child may experience such harm.

This would place the child's welfare at the centre of the court's consideration, to review alternative arrangements placed before it, and determine whether to make any orders against a local authority. The court would still not be able to create care plans. It is envisaged these powers would be akin to s8 of the Children Act 1989 and enable the court to prohibit the continuation of ongoing circumstances and make directions for action to be taken by the local authority in the child's best interests.

The procedure for such applications will need to be accessible for children in care. Consideration will also need to be given as to whether those who hold parental responsibility are made respondents automatically, and the availability of legal aid for applicants and respondents. It would defeat the object of this amendment entirely if legal aid were not readily available for children to make these applications.

Supporting victims and survivors

The report identified several failings of agencies, including CAMHS, regarding support and therapy being provided promptly to victims of child sexual abuse. The IICSA recommends the UK and Welsh Governments introduce a national guarantee that child victims of sexual abuse will be offered specialist and accredited therapeutic support. This should be fully funded and the responsibility for commissioning services should be given to the local authority. The Inquiry recommends there be no eligibility criteria to access this support, other than being a victim of child sexual abuse.

This would be a hugely positive step for the victims of child sexual abuse and may help improve their long term outcomes and life-chances. For care practitioners, if such allegations were a feature of a case then this would likely provide an onus on local authorities to commission these services and not wait for CAMHS to accept or refuse a referral. That said, in the current political and financial climate, it is hard to see this being made a priority in the 2023 budget.

Thoughts for Family Law Practitioners

This article is written prior to any official response being received by the government, including if there are any proposals for new legislation or amendments to the Children Act 1989.

There are other takeaways from the report. It perhaps offers some useful reminders for all practitioners and judges when dealing with children cases, especially care cases where abuse allegations often feature. For example, the need for prompt access to suitable therapy and that professionals should use a trauma-based approach when dealing with a child who has made such allegations. This would require a change in approach seen in many care cases where the view of CAMHS is that the child needs to have stability – often understood to be the conclusion of proceedings – before therapy can commence. There is also a challenge to the approach to cases in general where a child is behaving in a "difficult" way, for example absconding from care: whether this is a pattern of behaviour attributable to underlying trauma experienced at home or in a placement, or a sign of something experienced subsequently.

Practitioners may recall the era of the starred care plan which was brought to an end in *Re S & W* [2002] 2 AC 291], which led to the introduction of IROs. Since their introduction there has been debate as to whether an IRO, an employee of the local authority, can truly be independent. If the amendments to the Children Act are implemented, this would involve a reconsideration of a fundamental principle of the Act, that the local authority with the benefit of a care order can make decisions in loco parentis without intervention from the court.

It is assumed that by also recommending the lower threshold of "reasonable grounds to believe" at an interim stage, the intention is for practitioners to utilise case law concerning the making of interim care orders. However, this may lead to an interesting debate as to how that decision will interact with final threshold, a higher test, having already been met in care proceedings. Should a final care order be permitted to be disturbed by interim-standard evidence? There may also be a difference in arms at the interim stage – a local authority has access to evidence and case records (a parent does not usually

have much disclosure in interim care order applications) but the applicant child will unlikely have such information in their possession. How this will be addressed in giving legal advice, obtaining evidence, and making the application will require considerable thought.

On a practical level, it is not abundantly clear how a child will be informed of this new right to challenge their placement on the basis of suffering harm. The expectation is clearly that this would be accessible, but what that means in real terms is yet to be seen. Could the CPA have a role? Or could the challenge be met by Independent Reviewing Officers acting more robustly by suggesting that a child seek legal advice about a safeguarding concern? It is foreseeable that parents, who retain some parental responsibility under care orders, should have standing to help their child bring this application. Another facet to be considered is whether Cafcass should retain a vestigial role as a litigation friend to assist in bringing applications and deciding whether a child has capacity to instruct their own legal adviser. This will be an important consideration to ensure children who are not Gillick competent to bring an application by directly instructing solicitors still have a mechanism to access this new legal right of challenge – otherwise it risks leaving younger children in care disempowered to challenge their corporate parent.

What is fair to conclude, is that such a change in legislation raises some challenging and fascinating questions as to how looked after children – arguably some of the most vulnerable in society - can be empowered to prevent the risk and occurrence of significant harm while in the care of the state.

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1. Report by the Centre of expertise on Child Sexual Abuse, "Trends in Official Data" 2020/2021
2. In England at the end of March 2021, 14% of looked after child were in secure units, children's homes or semi-independent accommodation and 71% were in foster placements. In 1973, 59% of children were in residential settings.

SOLICITORS' SCOPE OF DUTY: NOT YET OBVIOUS

By Francesca O'Neill

Since *Minkin v Landsberg* [2016] 1 WLR 1489, and more recently *MBS v Grant Thornton* [2021] UKSC 20, lawyers generally think that they understand how arguments on the scope of duty for professionals should run. The law is constantly developing, but scope of duty has become more controversial. For those lawyers who routinely act for Claimants and Defendants in workplace liability claims, especially employer's liability and public liability personal injury claims, these issues are really important. It is vital to know the extent of the work your client expects you to do and the duties that you owe them. For that reason, the following article deals with the latest developments on solicitors' liability.

In *Minkin,* the court said that a solicitor's duty is limited to carrying out the tasks which the client has instructed him or her to do, and the solicitor has agreed to undertake. The Court of Appeal recognised that solicitors would be loathe to take on narrow tasks, which usually carry with them a low fee, if they feared that they might be assuming wider duties to a client than they had bargained for.

In *Spire Property Development LLP v Withers LLP* [2022] EWCA Civ 970 the Court of Appeal considered whether solicitors which had acted on a conveyancing transaction had a duty to advise on the impact of power cables discovered underneath the property after the conclusion of the conveyancing process. It repeated the statements of principle set out in *Minkin* and cited with approval the statement of Patten LJ in *Lyons v Fox Williams* [2018] EWCA Civ 2437 that neither Credit Lyonnais (the "rotten tooth" analogy) nor *Minkin* were authorities "*for the proposition that a solicitor is required to carry out investigative tasks in areas that he has not been asked to deal with, however beneficial to the client that might in fact have turned out to be".*

There are several recent decisions that show the approach of the courts to these issues today: *Miller v Irwin Mitchell LLP* [2022] EWHC 2252 (Ch) [Andrew Warnock KC leading Andrew Spencer] and *Harry v Curtis Law LLP* [Francesca O'Neill] (unreported; see the *Law Gazette* for further information).

In *Miller* (now under appeal) claimant had fallen down some stairs on holiday and had injured her leg. On 19 May 2014, she called the defendant's legal helpline after seeing a television advertisement. She was given some advice about personal injury claims and was referred to the defendant's international travel litigation group. The defendant's advertisement did not amount to an offer to provide legal services. It was an invitation to the public to call the helpline to see if the defendant could help by providing legal services. It was, at most, an invitation to treat. No implied retainer had arisen, *Dean v Allin & Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep. 249, [2001] 5 WLUK 606 and *Caliendo v Mishcon de Reya* [2016] EWHC 150 (Ch), [2016] 2 WLUK 154 applied (paras 109-110).

The circumstances in which a retainer can be implied were also considered in *McDonnell v Dass Legal Solutions* [2022] Costs LR 855 where the Claimant sought to argue that there was an implied retainer between himself and a firm of solicitors, based on a conversation lasting a few minutes. The Claimant had a longstanding relationship with the solicitors, and argued that either a new retainer could be implied or the further instructions were in line with a pre-existing commercial relationship (remember that old chestnut 'a course of dealing'?). In keeping with both prior authority on the point and recent trends, the court took a stringent view towards the tests that any claimant would have to satisfy in order to show that a retainer had come into existence:

- Where there is no express retainer, an implied retainer would only be if the test for implication was met. That test is one of necessity.
- A retainer would not be implied just because it was convenient to one of the parties.
- The fact that there was no express retainer was powerful evidence in support of the argument that there was no implied retainer either.

In *Harry,* HHJ Mitchell dismissed a claim against conveyancing solicitors. The purchaser of a new build house in Plymouth attempted to enhance the duty that her conveyancing solicitors owed her. She used a firm of local solicitors who had acted for her in selling a

previous home. They acted for her on a low fixed fee conveyancing package. The scope of the written retainer promised to investigate title, and perform local authority searches. This they duly did, and the search did not give details of any major road schemes within 200m of the house. The search was wrong. In fact, the Forder Valley Link Road ("FVLR"), a major new road development linking two parts of Plymouth was to be constructed along a route running past the end of the road on which her house was situated. The new road was less than 50m from her house.

She sued CWC for breach of retainer/duty, claiming that they ought to have advised her about the road, and that she would not have bought it had she been so advised. She claimed that as a result she had suffered a diminution of value in the house, and considerable distress both of which sounded in damages.

The decision is interesting for solicitors (and their professional indemnity insurers) taking on large volume, low cost work (such as conveyancing, or low value personal injury claims) who seek limit the scope of their retainer. It is clear that paying less, or even nothing, for a professional service does not alter the standard of the work that must be completed (see *Burgess v Lejonvarn* [2017] EWCA Civ 254). However, in this case, it was successfully argued that the low fee and strict limitation of the retainer *circumscribed* the work that had to be done (following *Thomas v Hugh James Ford Simey Solicitors* [2017] EWCA Civ 1303, *Denning v Greenhalgh Financial Services Ltd* [2017] EWHC 143 (QB). In particular, HHJ Mitchell found that there was no obligation on CWC's part to advise on matters which were features of the wider development as opposed to this particular property. They were entitled to rely on the results of the searches, which did not raise any particular concerns (therefore distinguishing *Orientfield Holdings v Bird & Bird* [2017] EWCA Civ 348). There was no need to make further enquiry, or read hundreds of pages of planning material that related to the development.

We cannot leave this topic without any consideration of the most recent decision regarding the extent of solicitors' duties. In *Belsner v Cam Legal* [2022] EWCA Civ 1387, the Court of Appeal was facing a claim worth less than £300 but a complicated question about the extent of solicitor's fiduciary duties when agreeing a conditional fee agreement. Again, the focus is on solicitors who undertake low value, fixed fee work – in this case, low value road traffic accident litigation. The claimant wanted a refund of that portion of her fee which was greater than the fixed recoverable cost element to which it corresponded.

The Master of the Rolls commented it was unsatisfactory that solicitors were signing their clients up to retainers which allowed them to charge greater than fixed costs and that a voluntary cap *ex post facto* did not alleviate this situation. Further, CAM Legal had failed to comply with their professional duties under the Solicitors Code of Conduct by failing to provide the best information as to costs to the client at the outset of the claim, and therefore failing to obtain informed consent. He commented:

"*Had [the claimant] also been told of the level of the fixed recoverable costs, she would have been able to compare the likely recoverable costs with the amount she was being asked to agree to pay the Solicitors. As the Client submitted to us, she would then have known that she was assuming a liability to pay the Solicitors five times the costs she would be getting back from the defendant"* [84]

Although CAM Legal protested that they would never have acted on the full extent of the liability and charged her that much, this was found to be a wholly unsatisfactory situation and one which needed to be addressed both by solicitors acting in this way and possibly by law reform. The Judge said: *"In my judgment, it is wholly unsatisfactory for solicitors generally, and these Solicitors in particular, routinely to suggest that their clients agree to a costs regime that allows them to charge significantly more than the claim is known in advance to be likely to be worth. Solicitors do not resolve this unsatisfactory state of affairs by allowing a discretionary reduction of their charges after the case is settled"* [85-86]

Solicitors may be rubbing their hands together with glee at decisions which appear to go in their favour and in limited scope of the duties that they owe their clients. Only time will tell whether it is the criticism of their conduct in *Belsner* or the clear delineations in *Miller, Harry,* and *McDonnell* that are remembered.

THE PROTECT DUTY

By Ian Clarke

On 22 May 2017, a suicide bomber detonated a homemade bomb at the Manchester Arena, killing 22 people. During the public inquiry that followed, it was revealed that 1,017 people had sustained some form of injury as a result of the atrocity. One of the victims was Martyn Hett and since that tragedy Martyn's mother, Figen Murray, has campaigned for Martyn's Law, a series of legislative changes that would aim to improve security at publicly accessible locations.

The impetus behind Martyn's Law, or the Protect Duty as it has become known, was strengthened following other low sophistication but high impact terrorist outrages (such as the Westminster and London Bridge attacks on 22 March 2017 and 3 June 2017 respectively). The Government launched a consultation on the proposed duty on 26 February 2021 targeted at all those who would potentially be affected by the Protect Duty, such as the venues, organisations, businesses, and local and public authorities and individuals who own and operate publicly accessible locations.

The consultation received 2,755 responses from a variety of organisations and campaigners with the majority favouring the introduction of stronger measures, including a legal duty to ensure preparedness for and protection from terrorist attacks. In the Queen's Speech that was held on 10 May 2022, the Government confirmed its intention of bringing forth a draft bill in the coming Parliamentary year.

PALs are defined as 'any place to which the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission'. That definition would encompass a variety of locations including sports stadia, festivals and music venues, hotels, pubs, clubs, retail stores and shopping centres, schools and universities, hospitals, transport hubs, beaches, public squares and other open spaces.

Currently, there is no legislative requirement for such venues to employ security measures (with the exception of transport security and some sports grounds). Of the organisations who responded to the consultation, only 50% currently undertake a risk assessment for terrorism. Likewise, when asked the question "What mitigations against terrorism risks does your organisation currently undertake?", of the 1,083 respondents, only 498 provided staff training to raise awareness of terrorisms threats.

While many organisations do choose to implement their own security measures the suggested Protect Duty aims to "*create a culture of security, with a consistency of application and a greater certainty of effect*,"[1] and would create a legal requirement for publicly accessible locations to ensure preparedness for and protection from terrorist attacks. As originally envisioned the duty would place five key requirements on the operators of publicly accessible locations:

- To engage with freely available counter-terrorism advice and training;
- To conduct vulnerability assessments: i.e. a terrorism specific risk assessment developed alongside local authorities and Safety Advisory Groups;
- To have a mitigation plan in place to deal with "vulnerabilities". Such a plan may include the provision of metal detectors, having search policies in place, the installation and monitoring of security cameras etc;
- To have a counter-terrorism plan in place. A proposed three-step plan is suggested called *Guide, Shelter, Communicate*. The idea is to *Guide* people towards a safe location, *Shelter* people and *Communicate* with members of the public and the authorities; and
- For local authorities, to plan for terrorism events and consider counter-terrorism in the Local Resilience Forum.

The Manchester Inquiry and its Recommendations

Sir John Saunders' Public Inquiry into the Manchester attack noted that the creation of such a duty was an

"*ambitious project*". Sir John noted the potential scale of the duty: that it will apply to every space to which the public has access so that wherever members of the public go within a public space, some person or organisation will have the responsibility to take steps to protect them against a terrorist attack.

The Government's Consultation considered three different areas to which a Protect Duty might apply. First, public venues which are capable of accommodating an audience in excess of 100; second, large organisations employing more than 250 people; and third, public spaces. Sir John, in Volume 1 of his report, confined his remarks on the Protect Duty as it could potentially apply to large public venues[2].

Clearly the Protect Duty must encourage a proportionate response. However, working out what is proportionate in any particular instance is a thorny task as any increase in protective measures will have consequences both for those implementing them (in terms of time, money and opportunity costs) and for members of the public (in relation to ease of access to venues and civil liberties issues). Sir John wrote that having seen the outcome of the attack on 22 May 2017 and the consequences that followed, he recommended that "*when considering what is the appropriate Protect Duty for premises like the Arena, a high standard of protective security is justified*".

Sir John's recommendations went beyond requiring the operators of large venues to consider how best to mitigate the risk of terrorism once the venue was operational but suggested that for venues with a large audience capacity "*considerations of eliminating or reducing risk from terrorist attacks should be part of the pre-building process*." Presumably, a failure to effectively comply with Protect Duty considerations at the building stage would cause licensing problems which could prevent a venue opening to the public.

In terms of how the Duty should be framed, Sir John suggested borrowing a phrase from existing health and safety legislation and recommended that "*a formulation of the duty could be to take such steps as are 'reasonably practicable' to ensure the security of members of the public while they are on land, or in premises, with express or implied permission to be there. Members of the public falling into this category will be those to whom the Protect Duty is owed. It should include employees of the Protect Duty-holder.*"

If that formulation were to be adopted, the next logical question would be to address who would be subject to the Duty. The Consultation proposed that the Duty would fall upon landowners and occupiers. However, difficulties could arise in the context of shared spaces with several potential organisations being "Duty-holders". It is also possible that the concept of who is a Duty-holder could be extended to those organisations who provide crowd management and security services. There is even the suggestion that the Police could be made subject to the Protect Duty, not based on the ownership or use of property (although they would be subject to such a duty on their own premises) but as a positive duty to provide a framework to reinforce the need for vigilance.

Whatever shape the Duty to Protect ultimately takes, it will have profound consequences for all manner of employers, requiring them to assess the risks of a terrorist attack and, probably, to thereafter take all reasonably practicable measures to ensure the safety of members of the public and their employees.

Further, how the Duty will be enforced, both in terms of ensuring compliance with the Duty through inspections and/or whether an alleged failure to comply with the Duty post-incident would give rise to civil litigation, remains to be seen. However, the Protect Duty will have significant ramifications for the way we organise our public spaces and how such spaces are designed, built and managed.

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1. See The Government's Response Document

2. Although many of his remarks would be relevant to the other two categories.

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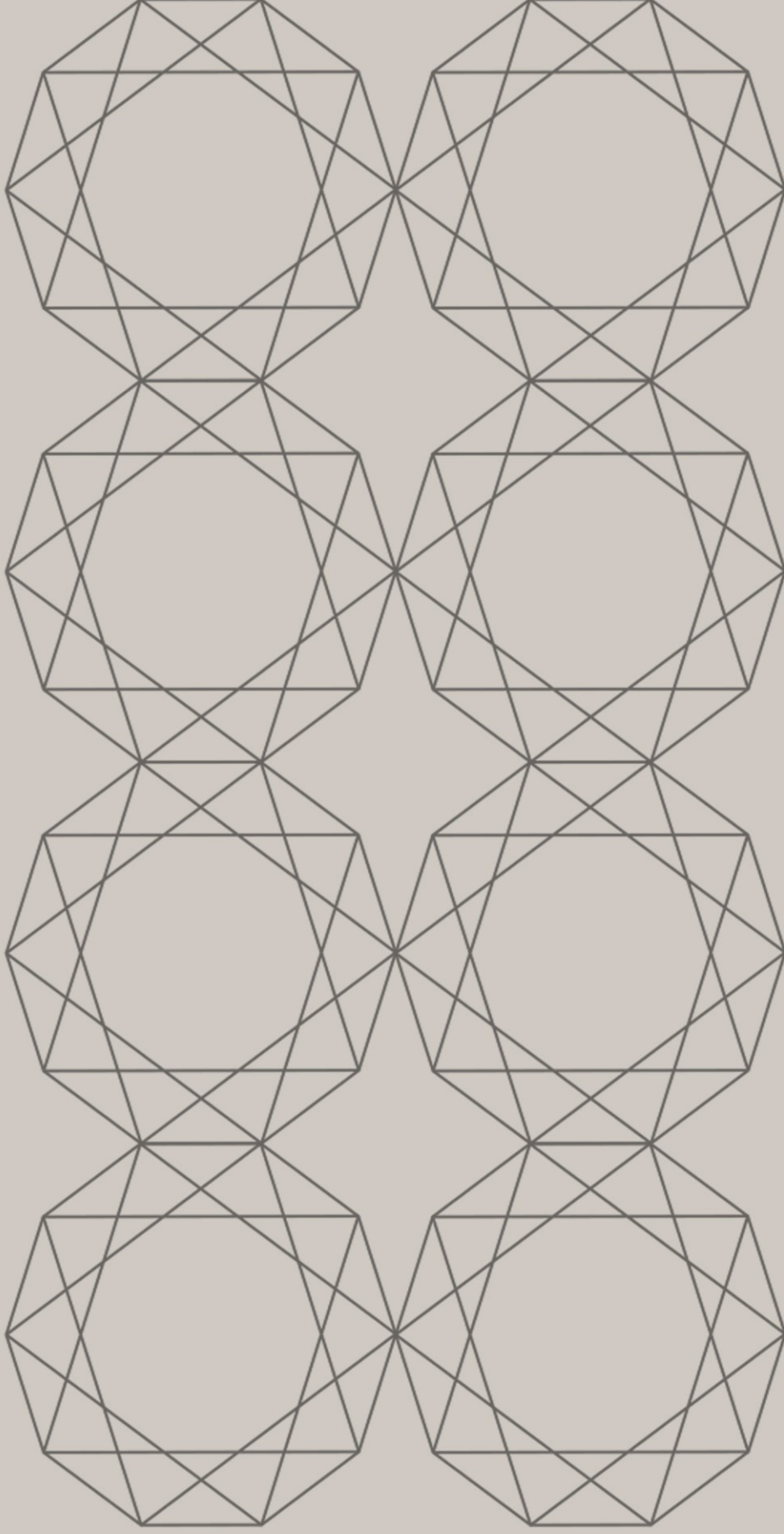

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